

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**BRYON DALE TASH, DECEASED**  
Claimant

VS.

**ABLE DESIGN PLASTICS, INC.**  
Respondent

AND

**EMPLOYERS INSURANCE OF WAUSAU**  
Insurance Carrier

Docket No. 268,534

**ORDER**

Claimant requested review of the August 12, 2003 Award by Administrative Law Judge (ALJ) Jon L. Frobish. The Appeals Board (Board) heard oral argument on February 3, 2004.

**APPEARANCES**

Timothy A. Short of Pittsburg, Kansas appeared for the claimant. Garry Lassman of Pittsburg, Kansas appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award with two clarifications. First, the ALJ's Award listed medical records of John Venter, D.O. as being contained within the record. During oral argument, respondent's counsel made it clear that Dr. Venter's records were the subject of a stipulation that had a limited purpose. The stipulation was intended to satisfy the authentication issue so as to avoid an unnecessary records deposition. However, respondent did not and has not stipulated that those records are admissible, thereby eliminating the need for Dr. Venter's deposition as required by K.S.A. 44-519. Claimant did not contradict this contention.

Second, the Award indicates that the parties stipulated to written claim. This is inaccurate. Respondent initially admitted timely written claim but at the Regular Hearing, that stipulation was retracted and both parties briefed it in their written submission letters. However, the ALJ did not address whether respondent was relieved of its initial stipulation.

### **ISSUES**

The ALJ found this claim for survivor's benefits was not barred by her husband's 1997 settlement of his workers compensation claim. The ALJ went on to conclude there was insufficient evidence to establish that the Decedent's death in 2001 was caused by his occupational injury. As a result, he concluded no benefits were owed and the previous settlement remained in full force and effect.

Sharon Ann Tash (Claimant) requests review of the ALJ's determination that no survivor's benefits are due her under the Kansas Workers Compensation Act, K.S.A. 44-501, et seq. (the Act), as a result of the death of her husband, Byron Dale Tash (Decedent). Specifically, claimant contends the evidence supports her contention that Decedent's death was causally related to his chronic obstructive pulmonary disease (COPD) which he alleged was work-related and was the basis of a claim that was settled on November 6, 1997.

Respondent argues that the ALJ was correct in his analysis as to the causation aspects of this claim and should be affirmed in all respects. Respondent maintains claimant's evidence fails to sufficiently establish any causation between Decedent's death and his alleged work-related COPD. In addition, respondent argues causation should not even be an issue as this claim is barred by virtue of the 1997 settlement with claimant. Furthermore, even if respondent were found to owe any benefits under the Act, any payments due would be subject to a credit for those sums paid and all future payments under the prior settlement.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Decedent began working for respondent in 1995 as a painter. During the course of his employment, he developed a respiratory problem. This was ultimately diagnosed as COPD. Respondent provided medical treatment and Decedent was off work for a period of 43 weeks. Although he returned to work, Decedent spent a great deal of time away from his position taking breathing treatments. Ultimately, in January 1997 he left work.

Thereafter, Decedent and his lawyer negotiated a settlement with respondent to resolve the outstanding issues in his undocketed workers compensation claim. On November 6, 1997, the claim was settled. Decedent agreed to accept \$50,000 in cash and structured payments totaling an additional \$112,000. The terms of the settlement provided that in the event of his death, any unpaid periodic payments would be paid to his spouse, the Claimant in this action.

On March 23, 2001, Claimant returned home from work . She testified that when she discovered her husband, his eyes were open as was his mouth and his arms were up over his head. Claimant asked her son to call an ambulance. The police and medical personnel responded to the call and Decedent's death was confirmed. The funeral home was called to retrieve the body.

No autopsy was performed nor was he taken to a hospital. Within a few days the police contacted Stephen Bazzano, D.O., Decedent's personal physician and asked him to sign the death certificate. Dr. Bazzano signed the death certificate and listed Decedent's cause of death as "acute myocardial infarction due to consequences of chronic obstructive lung disease."<sup>1</sup>

On August 24, 2001, Claimant filed an application seeking death benefits under the Act. At the regular hearing, the ALJ<sup>2</sup> indicated "[b]asically the issues [sic] are whether or not the death was related to the work accident."<sup>3</sup> While Claimant agreed with this assertion, respondent added the following:

That's the primary issue, Judge. I [respondent's counsel] would like for you also to show on there that -- And I know that Tim will argue this, that we have admitted it. But sort of as a corollary of that issue, that the work did not cause the condition which is alleged to have resulted in his death. Also we would be raising the issue of whether the claim is barred by virtue of the settlement, the nature of the settlement, in 97. There is some corollary issues as to whether if it is compensable credit should be given for payments previously made. And then there is some issues with regard to evidentiary matters, but I think we can take care of those in the submission letters.<sup>4</sup>

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<sup>1</sup> Bazzano Depo. at 7.

<sup>2</sup> Kenneth J. Hursh served as the ALJ at the regular hearing.

<sup>3</sup> Reg. Hrg. Trans. at 4.

<sup>4</sup> *Id.* at 4-5.

Claimant's counsel then added that wage was also in dispute. Respondent's counsel indicated that a deposition would be scheduled on that issue.<sup>5</sup> No deposition was ever taken.

The ALJ issued his Award on August 12, 2003 and addressed two issues. First, whether the present claim is barred by the Decedent's settlement entered into in November 1997. On this issue, the ALJ concluded the matter was resolved by the holding in *Routh*.<sup>6</sup> He concluded "[t]he surviving spouse, Sharon Tash, has a right of action to bring this claim."<sup>7</sup>

The Board has reviewed the relevant case law cited by the parties and concludes the ALJ's finding as to the effect of the prior settlement must be affirmed. The *Routh* decision squarely resolves the question of whether a Decedent's settlement of a workers compensation claim is a bar to a subsequent claim for survivor's benefits following an alleged work-related death. In making its decision, the *Routh* Court reasoned as follows:

[t]he right of action of dependents does accrue at the time of the accident, and everything must relate back to the situation at that time, but dependents have no standing or independent right of action while the workman is living. After his death they have such right of action, which, in that sense, does accrue after the death of the workman.<sup>8</sup>

Accordingly, the survivors were allowed to file a new claim to recover the maximum benefits then available under the law in existence at that time.

In the instant action, the Decedent settled his claim for an occupational injury in November 1997. As the claimant in that proceeding, he attended a hearing and entered into a settlement with the respondent. In exchange for the payments agreed to by the two parties, Decedent released respondent from any further liability, including future medical benefits. Mrs. Tash was not a party to that proceeding and other than her roll as a contingent payee of the structured settlement proceeds, she had no role in that transaction.

Under the *Routh* rationale, Claimant had no standing to assert a claim for survivor's benefits until Decedent's death. At that point, her right of action matured and could be asserted. The Board affirms the ALJ's finding that the 1997 settlement is no bar to Claimant's pending claim for survivor's benefits.

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<sup>5</sup> *Id.* at 5-6

<sup>6</sup> *Routh v. List & Weatherly Construction Co.*, 124 Kan. App. 222, 257 Pac. 721 (1927).

<sup>7</sup> Award at 3.

<sup>8</sup> *Routh* 723.

The second issue concerned whether his work-related injury caused Decedent's death. On this issue the ALJ concluded claimant failed to sustain her burden of proof that the death of Decedent was a result of his occupational injury.

In support of her claim, Claimant offered the testimony of Dr. Bazzano, who was Decedent's personal physician and began treating him on December 22, 2000, approximately three months before his death. Dr. Bazzano testified his role was not as an active treater but more as a "referree", providing ongoing medications as Decedent was apparently being actively treated for his COPD by a pulmonologist.<sup>9</sup> He saw Decedent on three occasions, the last contact being 3 days before his death. Sometime thereafter, Dr. Bazzano wrote a letter to Claimant's counsel and stated the following:

Mr. Byron Tash was a patient of mine who died of cronic [sic] lung disease. The cause of death was work related.

If further information is needed please contact me at my office.<sup>10</sup>

When asked to explain the basis of his opinion regarding Decedent's cause of death and the relationship to COPD as contained on the death certificate and in his letter, Dr. Bazzano replied "I think it [COPD] would be a contributing factor, yes, because people who have lung problems, you know, puts [sic] an extra load on their heart, makes their heart have to work harder."<sup>11</sup> On cross examination it was revealed that Dr. Bazzano did not see or examine Decedent's body following his death nor did he do any sort of investigation before attributing Decedent's death to COPD. He appears to have concluded, based upon the information he was given about the position and condition Decedent was found, what Decedent told him during their three office visits, the medications Decedent was taking along with the medical records in his possession, that the cause of death would "appear" to be a myocardial infarction. Dr. Bazzano went on to state that "[p]eople with lung problems have more incidents of heart attacks."<sup>12</sup>

As for his opinion that the "cause of death was work related" Dr. Bazzano made that conclusion based upon the "medicines he [Decedent] was taking, from listening to his lungs, and from his history."<sup>13</sup> Dr. Bazzano had no specific details regarding Decedent's

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<sup>9</sup> Bazzano Depo. at 9.

<sup>10</sup> *Id.*, Ex. 2.

<sup>11</sup> Bazzano Depo. at 7.

<sup>12</sup> *Id.* at 13.

<sup>13</sup> *Id.* at 13-14.

work or personal history other than the fact that he believed Decedent was a painter. Dr. Bazzano was asked if he knew of any other factors that would be possible causes of COPD other than Decedent's work. He acknowledged that smoking would be a factor but that he was unaware whether Decedent had ever been a smoker.<sup>14</sup>

Claimant also offered the testimony of Daniel Doornbos, a pulmonologist, who examined the Decedent in connection with his undocketed claim at the request of the insurer. Dr. Doornbos saw Decedent only one time, in June 1997. At that time, his written assessment of Decedent was as follows: "[t]he patient very clearly seems to have at least a moderate degree of obstructive airways disease."<sup>15</sup> Dr. Doornbos assigned a permanent impairment based upon a compromised pulmonary function of 41 to 59 percent of predicted performance. In other words, Decedent's lung capacity was approximately half of what could normally be expected of one his age.

Because Decedent was a smoker and the respondent denied liability for any work-related injury, Dr. Doornbos was asked to perform an examination. He then issued a report on June 4, 1997 to the insurer. In his report Dr. Doornbos indicated claimant had "moderate" obstructive lung disease. When he was deposed in connection with Claimant's claim for survivor's benefits, he testified that "its possible that the majority effect was from the irritation that he got at work, but I wouldn't say that I thought it was medically probable in the legal sense, that was for sure the case."<sup>16</sup>

With respect to Decedent's cause of death, he was asked if it was more likely than not that Decedent died of his respiratory problems. Dr. Doornbos replied as follows:

Okay. One or two things that I make note of in these notes from Doctor Venter is that there is some question in the earlier notes, from '99, of whether he was getting secondhand smoke from his wife when they drove in a car. The next to the last note, which was September 27, 2000, indicates he had continued to smoke cigarettes, which again is perhaps understandable, given the situation, but which almost certainly contributed to the worsening of his asthma, you know, so he apparently developed hepatitis-C infection. He also had begun to have a label put on him of panic disorder and chronic pain syndrome, for which he was also on some narcotics and Xanax, which is an anxiety-relieving medication that's somewhat of the same chemical class as Valium. Again, I guess I do feel uncomfortable answering a question that is that entirely hypothetical, because although it is a possibility that he could have died of a severe asthma attack, where his lungs just broke up, it's also -

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<sup>14</sup> *Id.* at 16.

<sup>15</sup> Doornbos Depo., Ex. 1 at 3.

<sup>16</sup> *Id.* at 6.

- or seized up, where he couldn't breathe at all, it is also possible that he may have taken an overdose of his Percocet or of his Xanax, or he may have had other things going on. I just - - he could have had a heart attack, he could have had a pulmonary embolism. There are many things that can lead to death on a sudden basis, particularly in a man who is chronically ill, so to say that we know for a fact he even died of asthma, I think is considerably questionable without autopsy results showing plugging of the airways, et cetera, and even if we knew that he died of an asthma attack, which I don't believe I know, then to say that it was necessarily directly caused by his exposures, I think again really begs the question.<sup>17</sup>

When Dr. Doornbos was asked whether the condition of Decedent's body, specifically his mouth open and arms up over his head, was consistent with an asthma attack. He replied "[c]onsistent, yes. Necessary, no. He could have - he could have been up in pain because he had just had the worst heart attack of his life, or his aorta had just burst. . . there's a whole lot of things that can kill you suddenly, and that are painful. Asthma is only one of that list."<sup>18</sup> He went on to say "[t]he point is, I guess there is inadequate evidence to support any definitive medical conclusions."<sup>19</sup>

When presented with this evidence, the ALJ concluded Claimant failed to sustain her burden of proof. Specifically, he stated that:

Dr. Venter's records did not provide any new evidence in this matter and none concerning the [c]laimant's [Decedent's] death. Dr. Bazzano's conclusory opinion provides no facts concerning the [c]laimant's death. Dr. Doornbos provides the opinion there could be many reasons for the [c]laimant's death and could not say with a degree of medical probability that the [c]laimant's death was related to his occupational injury.<sup>20</sup>

The Board has considered all of the parties' evidence on the issue of causation and agrees with the ALJ's findings and conclusion. Dr. Bazzano's opinions are, at best, speculation. He had no first hand information upon which he could conclude that decedent suffered a myocardial infarction nor does he have a sufficient factual foundation upon which he could make a finding that Decedent's death was work related. Even if Dr. Venter's records are to be considered on this issue of causation, those records provide no further insight. Dr. Doornbos' testimony is by far the most persuasive and he indicates

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<sup>17</sup> *Id.* at 9-11.

<sup>18</sup> *Id.* at 11.

<sup>19</sup> *Id.*

<sup>20</sup> ALJ Award (Aug. 12, 2003) at 4.

there could be a number of reasons for the Decedent's death. Further, he could not say with a reasonable degree of medical probability that Decedent's COPD and ultimate death was related to his occupational injury. For this reason, the ALJ's Award is affirmed.

All other findings contained within the ALJ's Award are hereby affirmed.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Jon L. Frobish dated August 12, 2003 is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Timothy A. Short , Attorney for Claimant  
Garry W. Lassman, Attorney for Respondent and its Insurance Carrier  
Jon L. Frobish, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director